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No. 39

In the Supreme Court of the United States

OCTOBER TERM, 1941

CONTINENTAL CASUALTY COMPANY AND MARIE M. SHORT

v.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the District Court is not reported. It may be found in the Appendix to this brief, *infra*, p. 37.

JURISDICTION

The certificate of the Circuit Court of Appeals was filed in this Court on March 25, 1941. The jurisdiction of this Court rests upon Section 239 of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS CERTIFIED

"1. Is Section 1020 of the Revised Statutes (18 U. S. C. § 601) the exclusive source of the power

of the District Court of the United States at any time to remit the forfeiture of the penalty of a recognizance taken in a criminal cause?

"2. Is the word 'party' appearing in the phrase 'willful default of the party' in Section 1020 of the Revised Statutes (18 U. S. C. § 601) intended to describe

"(a) the person who makes application to the court for the remission of the forfeiture of the penalty, whether that person is the principal or the surety in the recognizance, or

"(b) only the principal in the recognizance?

"3. If the answer to Question 1 is 'No' does the District Court of the United States have common-law power to remit the forfeiture of the penalty of a recognizance taken in a criminal cause, where the default of the principal in the recognizance was willful?

"4. If Question 3 is answered and the answer thereto is 'Yes' is the common-law power to remit the forfeiture limited to exercise upon an application made within the term of court at which the order of forfeiture was entered?"

STATUTE INVOLVED

Revised Statutes Sec. 1020, 18 U. S. C. Sec. 601, provides as follows:

> When any recognizance in a criminal cause, taken for, or in, or returnable to, any court of the United States, is forfeited by a breach of the condition thereof, such

court may, in its discretion, remit the whole or a part of the penalty, whenever it appears to the court that there has been no willful default of the party, and that a trial can, notwithstanding, be had in the cause, and that public justice does not otherwise require the same penalty to be enforced.

STATEMENT

On June 20, 1940, Herbert R. Short was convicted in the United States District Court for the District of New Jersey upon two counts of an indictment charging conspiracy. On the same day, he was directed to appear in court on July 19, 1940, for sentence. Also on the same day, a recognizance in the sum of $10,000 was taken in court from Short, as principal, and from Continental Casualty Company, as surety. The condition of the recognizance was that Short would "appear for judgment and render himself in execution thereof upon such day as the District Court may order" (R. 1).

Short failed to appear for sentence on July 19, 1940. The court thereupon ordered a bench warrant to issue and the recognizance to be forfeited. Short was arrested on August 29, 1940, in Philadelphia. On September 12, 1940, he was brought before the District Court and sentence was then imposed upon him (R. 1).

On September 7, 1940, within the term of court at which the order of forfeiture had been entered, Continental Casualty Company, the surety in the

recognizance, and Marie M. Short, the principal's wife, who had given Continental Casualty Company counter indemnity in the sum of $10,000, filed a joint petition praying the District Court to remit the forfeiture theretofore entered on the recognizance. In a supplemental petition filed by Marie M. Short on September 21, 1940, it was alleged that she had at all times cooperated with the United States authorities and that she was of the opinion that it was chiefly due to the efforts she had made that her husband returned from Canada to Philadelphia preparatory to surrendering himself (R. 2).

The District Court found as a fact that the default of Herbert R. Short, the principal in the recognizance, had been willful. It dismissed the petition for remission of forfeiture on the ground that it was without power under Revised Statutes § 1020, 18 U. S. C. § 601, to grant the petition in view of the willful default of the principal, and that it had no power independently of the statute to entertain the petition (R. 2).

SUMMARY OF ARGUMENT

1. The provision of Section 1020 of the Revised Statutes which conditions remission of the penalty of a forfeited recognizance upon a showing that there has been no "willful default of the party" prevents remission in any case where the principal in the recognizance has willfully defaulted. The statute has been so construed by nine Courts of

Appeals; there is no Court of Appeals decision to the contrary. And this construction is clearly required both by the statutory language and by every relevant consideration of policy.

2. There is no merit in the ~~surety company's~~ appellants' contention that a federal district court may, within the term at which the order of forfeiture is entered, remit the penalty of the forfeiture in its discretion, even though the conditions of Section 1020 have not been fulfilled. Section 1020 contains no exceptions or qualifications; it applies in terms to all applications for remission made after its enactment. Had Congress intended to draw a distinction between the power of the court to remit a forfeiture within and after the term at which the order of forfeiture was entered, it would presumably have said so. Instead it used language of general applicability covering all applications whenever made.

The limitation which the appellants would read into the statute is completely illogical. There is no reason why Congress should have thought that different conditions should govern an application for the remission of a forfeiture made within the term at which the order of forfeiture was entered and an application made after the term. Furthermore, the basic premise of the ~~surety company's~~ appellants' contention—namely, that the federal courts had a common law power to remit a forfeiture within the term at which the order

of forfeiture was entered and that Section 1020 simply extended that power to applications made after the term—is, we believe, plainly erroneous. Whether the federal courts had any power to remit a forfeiture prior to the enactment of Section 1020 is highly doubtful; however, if the courts did have such power, it was clearly exercisable as well after as at the term at which the order of forfeiture was entered. Consequently, there is no basis for believing that Section 1020 was designed solely to extend the power of the federal courts to applications made after the term and that it was not intended to govern applications made within the term.

3. Should the Court reject the contention that Section 1020 was intended to govern all applications for remission of a forfeiture made after its enactment, the more difficult issue would be presented whether the federal courts have any power, in the absence of statute, to remit the penalty of a recognizance. The authority most strongly supporting the existence of the power is *United States* v. *Feely*, Fed. Cas. No. 15,082 (C. C. D. Va.), a decision rendered in 1813 by Chief Justice Marshall sitting at circuit. However, analysis of the English authorities relied upon in the opinion in that case, as well as of the various English statutory provisions for the remission of the penalty of forfeited recognizances, indicates that the *Feely* decision cannot be considered determinative. And consideration of the issue on

principle leads to the conclusion that the remission of the forfeiture of a recognizance is probably beyond the judicial competence in the absence of Congressional authorization.

4. The fourth question certified to this Court is whether, if the federal courts have common law power to remit the forfeiture of the penalty of a recognizance when the default of the principal is willful, this power is limited to exercise upon an application made within the term of court at which the order of forfeiture is entered. This question was not properly certified, since the application for remission in this case was filed within the term of court at which the order of forfeiture was entered. There is accordingly no occasion for the Court to consider whether, assuming that the federal courts have a common law power to remit a forfeiture, that power may be exercised after as well as within the term. The principle is firmly established that this Court will answer certified questions only upon points of law which are in actual controversy in the court below.

ARGUMENT

The certificate of the Circuit Court of Appeals raises two principal issues as to the construction and scope of operation of Section 1020 of the Revised Statutes, *supra*, pp. 2–3. One of these questions is whether the phrase "willful default of the party", as used in Section 1020, refers, on the one hand, to the principal in the recognizance or, on

the other hand, to the person, whether principal or surety, applying for remission of the forfeiture. If, as the Government contends and as the uniform decisions of the lower federal courts hold, the phrase refers to the principal alone, no remission of the forfeiture may be made pursuant to Section 1020 in this case, since the principal's default here was concededly willful.

If this construction of the statute be accepted, the further issue presented by the certificate remains, namely, whether the federal courts have power apart from Section 1020 to relieve a surety from liability on a forfeited recognizance. Resolution of this issue involves consideration of two questions: (1) whether the federal courts had a common law power, prior to the enactment of Section 1020, to remit forfeitures on a recognizance; and (2) whether, if they did have such common law power, Section 1020 is a limitation upon its exercise.[1] In the view of the Government, it is exceedingly doubtful whether the courts did have power to remit forfeitures prior to the enactment of Section 1020 (see pp. 27–34, *infra*). But decision of that difficult question is, we believe, unnecessary in this case, since we think it plain that Section 1020 was intended to govern all applications for remission made subsequent to

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[1] The certificate presents an additional question as to whether, if the federal courts have power to remit a forfeiture apart from Section 1020, that power is limited to exercise upon an application made within the term of court

its enactment—in other words, that it superseded or limited whatever power the federal courts might have had to remit forfeitures apart from statutory authorization.

I

SECTION 1020 OF THE REVISED STATUTES FORBIDS THE REMISSION OF A FORFEITURE WHEN THE PRINCIPAL IN THE RECOGNIZANCE HAS WILLFULLY DEFAULTED

Section 1020 derives directly from Section 6 of the Act of February 28, 1839, entitled "An Act in amendment of the acts respecting the Judicial System of the United States." 5 Stat. 321, 322.[2]

This section, in its present form, provides as follows:

> When any recognizance in a criminal cause, taken for, or in, or returnable to, any court of the United States, is forfeited by a breach of the condition thereof, such court

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at which the order of forfeiture is entered (R. 3). This question, we believe, was not properly certified to this Court, since the application for remission in this case was made within the term at which the order of forfeiture was entered (R. 2). There is, therefore, no occasion to consider the power of the courts to act upon an application made after the term. See pp. 34–36, *infra*.

[2] There has been only one significant change in the statute since 1839. As originally enacted, it permitted the remission of a forfeiture where there had been no "willful default of the *parties*". [Italics supplied.] When the statute was included in the Revised Statutes, the word "parties" was changed to the singular, so that it now reads "no willful default of the *party*". [Italics supplied.] The significance which has been attached to this change is discussed below at p. 15.

> may, in its discretion, remit the whole or a part of the penalty, whenever it appears to the court that there has been no willful default of the party, and that a trial can, notwithstanding, be had in the cause, and that public justice does not otherwise require the same penalty to be enforced.

During the century in which this statute has been on the books, there has been voluminous litigation concerning the meaning of its various phrases. It has been held, however, by nine Courts of Appeals, including the court below, that the prohibition contained in Section 1020 against the remission of a forfeiture where there has been a "willful default of the party" prevents a remission in any case where the principal in the recognizance has willfully defaulted.[8] There are many District

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[8] *United States* v. *Kelleher*, 57 F. (2d) 684 (C. C. A. 2), certiorari denied, *sub. nom. Greater City Surety & Indemnity Corp.* v. *United States*, 286 U. S. 565; *Sun Indemnity Co. of New York* v. *United States*, 91 F. (2d) 120 (C. C. A. 3); *United States* v. *Robinson*, 158 Fed. 410 (C. C. A. 4); *United States* v. *Nordenholz*, 95 F. (2d) 756 (C. C. A. 4); *Fidelity & Deposit Co. of Maryland* v. *United States*, 293 Fed. 575 (C. C. A. 5); *United States* v. *Costello*, 47 F. (2d) 684 (C. C. A. 6); *Henry* v. *United States*, 288 Fed. 843 (C. C. A. 7); *Skolnik* v. *United States*, 4 F. (2d) 797 (C. C. A. 7); *United States* v. *Capua*, 94 F. (2d) 292 (C. C. A. 7); *United States* v. *Libichian*, 113 F. (2d) 368 (C. C. A. 7); *Weber* v. *United States*, 32 F. (2d) 110 (C. C. A. 8); *United States* v. *Rosenfeld*, 109 F. (2d) 908 (C. C. A. 8), certiorari denied, *sub. nom. Ladinsky* v. *United States*, 310 U. S. 646; *United States* v. *American Bonding Co.*, 39 F. (2d) 428 (C. C. A. 9); *Fidelity & Deposit Co. of Maryland* v. *United States*, 47 F. (2d) 222 (C. C. A. 9); *United States*

Court decisions to the same effect.[4] Although some early District Court decisions interpreted the word "party" to refer to the person applying for the remission, rather than to the principal,[5] these cases have all been overruled by subsequent decisions of the circuit courts of appeals. No circuit court of appeals has ever ruled that "party" refers to any one other than the principal.[6]

The construction which has so uniformly been placed upon the statute by the circuit courts of

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v. *Von Jenny*, 39 App. D. C. 377; *United States* v. *Allan*, 39 App. D. C. 383; *United States* v. *Walter*, 43 App. D. C. 468.

[4] *United States* v. *Fabata*, 253 Fed. 586 (N. D. N. Y.); *Griffin* v. *United States*, 270 Fed. 263 (N. D. Ga.); *United States* v. *Shelton*, 6 F. (2d) 897 (E. D. La.); *United States* v. *Levine*, 1 F. Supp. 104 (E. D. N. Y.); *United States* v. *Petrone*, 19 F. Supp. 704 (D. N. J.); *United States* v. *Pessin*, 21 F. Supp. 896 (E. D. Wis.); *United States* v. *Vincent*, 10 F. Supp. 489 (D. Mass.); *United States* v. *Snyder*, 23 F. Supp. 161 (M. D. Pa.); *United States* v. *La Vine*, 28 F. Supp. 113 (D. Md.); *United States* v. *Vendetti*, 33 F. Supp. 34 (D. Mass.).

[5] *United States* v. *Duncan*, Fed. Cas. No. 15,004 (W. D. Pa.); *United States* v. *Traynor*, 173 Fed. 114 (E. D. Tenn.); *United States* v. *O'Leary*, 275 Fed. 202 (S. D. N. Y.); *United States* v. *Slaimen*, 6 F. (2d) 464 (D. R. I.); cf. *United States* v. *Santos*, Fed. Cas. No. 16,222 (C. C. S. D. N. Y.); *United States* v. *Barger*, 20 Fed. 500 (W. D. Pa.). Some of these decisions were rendered before the original statutory phrase "willful default of the parties" was changed in the Revised Statutes to "willful default of the party." See note 2, p. 9, *supra*. See also p. 15, *infra*.

[6] It is true that in *United States* v. *Kelleher*, 57 F. (2d) 684 (C. C. A. 2), certiorari denied, *sub nom. Greater City Surety & Indemnity Corp.* v. *United States*, 286 U. S. 565—one of the two cases referred to by the Circuit Court of Appeals in its certificate in this case as creating its doubt as to the proper

appeals is, we think, clearly required by its language. In no true sense can there be said to be a "willful default" by a surety within the meaning of Section 1020. The condition of the recognizance is that the principal will appear. If the principal appears, the condition is fulfilled and the surety is discharged; if the principal fails to appear, there is a default and the liability of the surety becomes fixed. But the default is that of the principal who fails to appear and not that of the surety, whose obligation does not even become fixed until after the principal has defaulted. And since in any case the only obligation imposed upon the surety by a recognizance is to satisfy a pecuniary liability, there can be no default by the surety except failure to pay. The statutory phrase "willful default of the party" plainly does

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construction of Section 1020—Judge Learned Hand expressed the view that the statute should be construed to refer to the party applying for remission of the forfeiture rather than to the principal in the recognizance. He ruled to the contrary, however, in deference to the views of six other circuits and of the Court of Appeals for the District of Columbia, all of which had construed the statute in a way contrary to Judge Hand's view. It may be noted that, in deciding the *Kelleher* case, Judge Hand was required to overrule his own previous decision as district judge in *United States* v. *O'Leary*, 275 Fed. 202 (S. D. N. Y.). In that case, Judge Hand made a partial remission of a forfeiture to a bail, despite a willful default by the principal, stating: "* * * it has been held that, *in spite of the words of the statute*, the forfeiture will be remitted against the bail, though the default was willful. Per Mr. Justice Nelson, *U. S.* v. *Santos*, 5 Blatchf. 104, Fed. Cas. No. 16,222". [Italics supplied.]

not refer to the failure of the surety to pay in the event of the principal's default; the order of forfeiture is always entered, and the application for remission of the forfeiture is generally made, as it was in this case, before there can be any default on the surety's obligation to pay.

The foregoing analysis is, to be sure, subject to one possible qualification which, however, in no way detracts from the force of our position. Historically, the bail has been regarded as more than a mere surety; he has been regarded, in certain aspects, as a custodian of the principal. This was clearly pointed out in *Taylor* v. *Taintor,* 16 Wall. 366, 371–372, where this Court said:

> When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another State; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. It is likened to the rearrest by the sheriff of an escaping prisoner. In 6 Modern it is said: "The bail have their principal on a string, and may pull the string whenever

> they please, and render him in their discharge." The rights of the bail in civil and criminal cases are the same. They may doubtless permit him to go beyond the limits of the State within which he is to answer, but it is unwise and imprudent to do so; and if any evil ensue, they must bear the burden of the consequences, and cannot cast them upon the obligee.[7]

Under this concept of the function of a surety on a bail bond, it may be urged that, if the principal fails to appear as required, the surety, in his capacity as custodian, shares the default of the defendant. Possibly it was for this reason that Section 1020, in the form in which it was originally enacted in 1839, conditioned remission of a forfeiture upon a showing that there had been no "willful default of the *parties*". [Italics supplied.] But even assuming both of these dubious premises, the position of the surety company in this case is not advanced. It is still the default of the principal which is critical, for it is upon his appearance that the bond is conditioned; the surety can at best be regarded as a guilty participant

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[7] See also *United States* v. *Van Fossen*, Fed. Cas. No. 16,607 (C. C. D. Kans.), cited with approval in *United States* v. *Mack*, 295 U. S. 480, 488; *United States* v. *Von Jenny*, 39 App. D. C. 377; Hawkins, *Pleas of the Crown* (6th ed., 1787), Vol. 2, pp. 140–141; Chitty, *Criminal Law* (5th ed., 1847), Vol. 1, p. 104; Petersdorff, *A Practical Treatise on the Law of Bail* (1835), pp. 514–515, reprinted in *The Law Library*, volume X, p. 290; Stearns, *The Law of Suretyship* (4th ed.), pp. 397–398.

in that default because it results from his failure to exercise his custodial powers.

It is significant that when the statute was included in the Revised Statutes as Section 1020, the word "parties" was changed to the singular "party". While the plural was used, there was some plausibility to the argument that the reference was to the persons applying for remission of the forfeiture rather than to the principal, since the principal was normally a single individual. Some District Courts so construed the statute. See note 5, p. 11, *supra*. But whatever doubts were created by the use of the plural were removed by the change from "parties" to "party." In the absence of other evidence of the legislative intent, the assumption seems warranted that the change was specifically designed to remove the ambiguity previously existing in the statute and to make clear the Congressional intent that the default of the principal should be determinative. See *Heary* v. *United States*, 288 Fed. 843 (C. C. A. 7); *Fidelity & Deposit Co. of Maryland* v. *United States*, 293 Fed. 575 (C. C. A. 5); *Skolnik* v. *United States*, 4 F. (2d) 797 (C. C. A. 7); *United States* v. *Costello*, 47 F. (2d) 684 (C. C. A. 6); *United States* v. *Nordenholz*, 95 F. (2d) 756 (C. C. A. 4).

Considerations of policy, too, support the construction of the statute for which we contend. To construe the condition as allowing remission of a forfeiture to an innocent bail, even though the

default of the principal be willful, would to a large extent nullify the protection which is afforded the Government by the presence of the surety on the bond, since the surety is almost always innocent. See *United States* v. *American Bonding Co.*, 39 F. (2d) 428, 430 (C. C. A. 9); *United States* v. *Capua*, 94 F. (2d) 292, 294 (C. C. A. 7). It is no answer to argue, as appellants do, that the purpose of a recognizance is not "to enrich the Treasury" (see *United States* v. *Feely*, Fed. Cas. No. 15,082 (C. C. D. Va.)), and that allowing remission of a forfeiture to an innocent bail will encourage sureties to aid in the arrest of defaulting principals. The fallacy of this argument was demonstrated in *United States* v. *Von Jenny*, 39 App. D. C. 377, 382, where the court stated:

> * * * It is quite true that revenue is not contemplated in taking a recognizance; the object is a higher and better one. Aside from its humanity the plain purpose is to secure the appearance of the principal for trial, or sentence, as the case may be, in order that there shall be prompt and certain enforcement of the criminal law. If sureties who have contracted and have it in their power to insure the appearance of their principal at the time and place stipulated may be relieved because, after permitting his escape, they may have made diligent efforts to arrest, or may even have arrested and produced him, there would be little inducement to diligence on their part

> in the first instance, and the punishment and prevention of crime would be seriously impeded. Having this in mind, we are of the opinion that it was the intention of Congress to promote sound public policy by the requirement that there shall have been no wilful default of the party charged with the offense.

There is also little force in the argument that Congress could not have intended to impose burdensome consequences on a surety who is innocent of wrong-doing. As the court pointed out in *United States* v. *Pessin*, 21 F. Supp. 896 (E. D. Wis.), a surety who signs a bail bond for compensation is engaged in a highly speculative venture. It is compensation easily earned if the principal justifies the surety's faith in him; it is costly in the extreme if the principal fails to appear. There is no reason to suppose that Congress intended the surety to earn the compensation where there is no default and yet be relieved of the risk where there is default and the defendant is subsequently arrested.

One other consideration is worthy of note. Not infrequently, as in this case, a commercial surety requires indemnity as a condition of signing the bail bond. Relief of such a surety, simply because of his innocence, would redound, not to the benefit of the surety, but to the benefit of the indemnitor. And where the indemnitor is the principal or, as in this case, a member of the principal's family, it

would not seem to accord with the policy of the statute to allow a remission simply because the surety did not actively assist in the flight of the accused.

II

THERE CAN BE NO REMISSION OF THE FORFEITURE OF A RECOGNIZANCE EXCEPT UPON COMPLIANCE WITH THE CONDITIONS OF SECTION 1020

There are two answers to the contention that the federal courts have discretionary power, apart from Section 1020, to grant applications for remission of a forfeiture. The first and conclusive answer, discussed in this section of the brief, is that Congress clearly intended Section 1020 to govern all applications for remissions of forfeiture made after enactment of the statute and thus to limit or supersede whatever power the federal courts may previously have had to grant such applications. The second answer, less plain, is that there probably never was a common law power to remit a forfeiture apart from statutory authorization. That question is considered in the next succeeding section of this brief (pp. 27–34, *infra*).

There can be little doubt that, as a general proposition, when Congress authorizes the federal courts to exercise a specific power upon certain designated conditions, the fulfillment of those conditions is a necessary prerequisite to the exercise of the power. See *Smith* v. *Stevens*, 10 Wall. 321, 326–327; *Durousseau* v. *United States*, 6 Cranch

307, 312–313; *The Raleigh & Gaston R. R. Co.* v. *Reid*, 13 Wall. 269; *cf. Michaelson* v. *United States*, 266 U. S. 42, 70. The very statement of the conditions, under the principle of *expressio unius est exclusio alterius*, implies a prohibition against exertion of authority under other or different conditions. Section 1020 contains no exceptions or qualifications; it applies in terms to all applications for remission made after its enactment. And this Court apparently so regarded it when, in *United States* v. *Mack*, 295 U. S. 480, 488, the Court stated: "This power of remission has been exercised from distant times both in the English courts (*King* v. *Tomb*, 10 Mod. 278; *In re Pellow*, 13 Price 299) and here. *United States* v. *Kelleher*, 57 F. (2d) 684. For the courts of the United States it is now regulated by statute. R. S. § 1020; 18 U. S. C. § 601."

Appellants' argument to the contrary runs as follows: The remission of a forfeiture is simply a modification of the judgment of forfeiture; since the federal courts have power to modify their own judgments within the term at which the judgment is entered, they have power to remit a forfeiture upon an application made within the term; the statute was not intended to limit that power but rather to grant the courts added authority, under certain conditions, to remit a forfeiture upon an application made after the term.

There are several answers to this argument. In the first place, it is without any support whatever

in the statutory language. Had Congress intended to draw a distinction between the powers of the court to remit a forfeiture within and after the term at which the order of forfeiture was entered, it would presumably have said so. Instead, it used language of general applicability which, as we have pointed out, in terms covers all applications, whenever made.

In the second place, the limitation which the appellants would read into the statute is completely illogical. We can think of no reason of policy, and the appellants suggest none, why Congress should have thought that different conditions should govern the granting of an application for the remission of a forfeiture made within the term at which the order of forfeiture was entered and the granting of an application made after the term. In this connection it may be noted that, under the appellants' contention, an application for remission, made a certain length of time after the order of forfeiture is entered, may be within the discretionary authority of the court to grant in one district and not in another district depending upon their particular rules as to the terms of court. This would seem clearly contrary to the Congressional intent.

In the third place, the basic premise of the contention—namely, that the federal courts, prior to the enactment of Section 1020, had a common law power to remit a forfeiture, but that that power was exercisable only within

the term at which the order of forfeiture was entered—is, we believe, plainly erroneous. Whether the federal courts had any power to remit a forfeiture without statutory authorization is highly doubtful; that question is discussed in the next section of this brief (pp. 27–34, *infra*). But we think it clear that, if the courts did have such a power, it was a power exercisable as well after as at the term at which the order of forfeiture was entered. If we are correct in this view, there is no ground whatever for believing that Congress, in enacting Section 1020, intended to draw a distinction between applications made within and those made after the term at which the order of forfeiture was entered and to have the limiting conditions of Section 1020 apply only to applications made after the term.

The appellants' contention is based on the theory that the remission of a forfeiture is simply a modification of the order of forfeiture; they urge that, since courts may modify their own judgments, but only within the term, so too they may remit a forfeiture, but only within the term. We believe this theory to be based upon a false conception of the nature of the remission of a forfeiture. When such a remission is made, the order of forfeiture is not modified, altered or vacated. To the contrary, the validity and effectiveness of the order is recognized, the remission being simply an act of grace releasing the obligor from the liability fixed by the order. *United*

States v. *Mack*, 295 U. S. 480, 489; *United States* v. *Jenkins*, 176 Fed. 672 (C. C. A. 4); *United States* v. *Rosenfeld*, 109 F. (2d) 908 (C. C. A. 8), certiorari denied *sub nom. Ladinsky* v. *United States*, 310 U. S. 646; *United States* v. *Libichian*, 113 F. (2d) 368 (C. C. A. 7); *United States* v. *Duncan*, Fed. Cas. No. 15,004 (W. D. Pa.); *Griffin* v. *United States*, 270 Fed. 263 (N. D. Ga.).*

Analysis of the nature of a recognizance and of the order of forfeiture entered upon a recognizance will make this clear. It is firmly established that a recognizance is a contract between the principal, the surety and the United States. *United States* v. *Van Fossen*, Fed. Cas. No. 16,607 (C. C. D. Kans.), cited with approval in *United States* v. *Mack*, 295 U. S. 480, 488; *United States* v. *Zarafonitis*, 150 Fed. 97 (C. C. A. 5), also cited with approval in *United States* v. *Mack*, *supra*; *United States* v. *Rosenfeld*, *supra*; Chitty, *Criminal Law* (5th ed. 1847), Vol. 1, p. 92; Petersdorff, *A Practical Treatise on the Law of Bail* (1835), p. 510, reprinted in *The Law Library*, Vol. X, p. 287; Anson, *Law of Contracts* (14th ed.), ch. IV, sec. 77; Kenny, *Outlines of Criminal Law* (15th ed.), p. 541.†

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* *United States* v. *Beeger*, 20 Fed. 500 (W. D. Pa.), upon which appellants rely, is to the contrary; however, this decision, rendered by the District Court for the Western District of Pennsylvania in 1884, scarcely seems persuasive authority in view of the cases cited in the text.

† *See Regina* v. *Smith*, (1892) 17 Cox, 601, as to the difficulty of binding an infant by a recognizance because of the infant's incapacity to contract. See also in this connection, Chitty, *loc. cit. supra*; Petersdorff, *loc. cit. supra*.

When a default occurs in the condition of the recognizance, the obligation of both the principal and the surety to the United States in the sum of the recognizance becomes fixed. As this Court stated in *United States* v. *Mack*, 295 U. S. 480, 488, upon default, "the sureties become the absolute debtors of the United States for the amount of the penalty." The order of forfeiture simply merges this absolute obligation in a judgment, with the same effect as when any other liability is reduced to judgment. The United States, in its capacity as creditor, may, of course, thereafter relieve from the forfeiture, just as any creditor may relieve his debtor of a liability merged in a judgment. Although Congress would normally be the instrumentality of the United States through which relief would be extended, Congress may undoubtedly authorize the federal courts, as it did by Section 1020, to exercise the power to grant relief in particular types of cases. And perhaps, by reason of some common law principle, the federal courts, even in the absence of Congressional authorization, may exercise this power with respect to a liability owing to the United States on a forfeited recognizance (but see pp. 27–34, *infra*). But such power, if it does exist, is far different from the inherent power of a court to modify, alter, or vacate its own judgment within the term upon a showing that the judgment is erroneous. The power to remit a forfeiture is one to relieve from a liability absolutely owing, not to change an erro-

neous judgment; the fact that the liability has been reduced to judgment is immaterial, since the power of the court to relieve a debtor from a conceded liability owed to the United States cannot be greater after, than before, judgment is entered.

Persuasive if not conclusive support is given to this analysis by consideration of the practice in England, from which any common law power of the federal courts to remit a forfeiture must derive. Under the English practice, upon default in the condition of a recognizance, the recognizance was "estreated"—that is, it was taken out from among the other records of the court and sent up to the Court of Exchequer. The principal and the sureties thereupon became absolute debtors of the Crown and the debt was collectible in *scire facias* proceedings in the Court of Exchequer. Blackstone's *Commentaries*, Vol. IV, p. 253; Chitty, *Criminal Law* (5th ed. 1847) Vol. 1, p. 92; Petersdorff, *A Practical Treatise on The Law of Bail* (1835), p. 536, reprinted in *The Law Library*, Vol. X, p. 302. Remission of the forfeiture could nonetheless still be secured from the Court of Exchequer upon proper cause shown. *In re Pellow*, 13 Price 299; Blackstone's *Commentaries*, Vol. IV, p. 254; Chitty, *loc. cit. supra;* Petersdorff, *loc. cit. supra.* Even if it be assumed that the Court of Exchequer in remitting a forfeiture exercised a common law and not a statutory power (but see pp. 27–34, *infra*), it is nonetheless clear that the power was not one to modify, alter or vacate its

own judgment, since there was no judgment of the Court of Exchequer to be modified, altered or vacated; the Court of Exchequer entered no order of forfeiture and, as *In re Pellow*, *supra*, shows, could grant an application for remission of a forfeiture before entry of judgment in the *scire facias* proceedings.

It should be noted, too, that in *United States* v. *Feely*, Fed. Cas. No. 15,082 (C. C. D. Va.)—the decision of Chief Justice Marshall, at circuit, upon which the appellants principally rely to establish that the federal courts have a common law power to remit a forfeiture—no order of forfeiture or judgment in *scire facias* proceedings had been entered. The power which Chief Justice Marshall exercised in suspending the recognizance in that case, therefore, could not have been derived from the power of the court over its own judgments.

The conclusion seems plainly to follow that, if the courts had any common law power to remit a forfeiture, that power was exercisable as well after as within the term at which the order of forfeiture was entered. Consequently, there is no foundation whatever for the argument that the purpose of Congress in enacting Section 1020 was simply to extend authority to the courts to remit a forfeiture after the term at which the order of forfeiture was entered.

The fourth and final answer to the surety company's contention that the limiting conditions of

Section 1020 do not apply to applications filed within the term is that it is opposed to the uniform course of authority. The decisions all recognize that, whatever common law power the courts might have had to remit forfeitures prior to the enactment of the statute, the exercise of that power in the federal courts is now regulated by Section 1020. See, *e. g.*, *United States* v. *Mack*, 295 U. S. 480, 488; *United States* v. *Rosenfeld*, 109 F. (2d) 908, 910 (C. C. A. 8), certiorari denied *sub nom. Ladinsky* v. *United States*, 310 U. S. 646; *United States* v. *Costello*, 47 F. (2d) 684, 686 (C. C. A. 6); *Skolnik* v. *United States*, 4 F. (2d) 797 (C. C. A. 8). Specifically, it has been held that applications for remission of a forfeiture, even though made within the term at which the order of forfeiture was entered, must be denied if the conditions imposed by Section 1020 are not fulfilled. *United States* v. *Rosenfeld, supra; Skolnik* v. *United States, supra; United States* v. *Kelleher*, 57 F. (2d) 684 (C. C. A. 2), certiorari denied, *sub. nom. Greater City Surety & Indemnity Corp.* v. *United States*, 286 U. S. 565. See also *Fidelity & Deposit Co. of Maryland* v. *United States*, 47 F. (2d) 222 (C. C. A. 9) and *United States* v. *American Bonding Co.*, 39 F. (2d) 428 (C. C. A. 9) in which, although the fact is not expressly stated, it appears probable from the facts which are recited that the applications for remission of the forfeiture, which

were denied because the statutory conditions were not satisfied, were filed within the term.[10]

We believe it clear, therefore, both on principle and authority, that Section 1020 must be considered as superseding or limiting whatever common law power the courts may have had prior to its enactment and that, since the conditions of the statute have not been fulfilled in this case, the District Court properly denied the application for remission.

III

IT IS HIGHLY DOUBTFUL THAT THE FEDERAL COURTS HAVE ANY POWER IN THE ABSENCE OF STATUTE TO REMIT THE FORFEITURE OF THE PENALTY OF A RECOGNIZANCE

Should this Court reject the contention advanced in the preceding point of this brief that Section 1020 was intended to govern all applications for remission of a forfeiture made after its enactment, the more difficult issue would be presented whether the federal courts have any power whatever, in the absence of statute, to remit the penalty of a recognizance.

On this issue there is little authority. The decision most strongly supporting the existence of the

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[10] It may be noted that, in the past, the controversial issue has been whether Section 1020 applied to applications made *after* the term at which the order of forfeiture was entered, the holding in almost all cases being that it did apply. *United States* v. *Duncar*, Fed. Cas. No. 15,004 (W. D. Pa.); *United States* v. *Jenkins*, 176 Fed. 672 (C. C. A. 4); *Henry* v.

power is *United States* v. *Feely*, Fed. Cas. No. 15,082 (C. C. D. Va.), decided in 1813 prior to the enactment of Section 1020. The opinion in that case, written by Chief Justice Marshall sitting at circuit, recognizes that the question is a close one and the English precedents few. In reliance primarily on *Rex* v. *Tomb*, 10 Mod. 278 (1714) and a statement appearing in Blackstone's *Commentaries*, Vol. IV, p. 254, however, Chief Justice Marshall concluded that the English courts did have a common law power to relieve from a forfeiture, that the power is not an unreasonable exercise, and that, in the absence of legislation to the contrary, it may be exercised by the federal courts. A similar view was expressed in *United States* v. *Duncan*, Fed. Cas. No. 15,004 (W. D. Pa.).

Rex v. *Tomb* does support this position. As Chief Justice Marshall pointed out, however, the case "is vaguely reported, and its circumstances are omitted." Furthermore, the holding of that

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United States, 288 Fed. 843 (C.C. A. 7); *Sun Indemnity Co. of New York* v. *United States*, 91 F. (2d) 120 (C. C. A. 3); *United States* v. *Libichian*, 113 F. (2d) 368 (C. C. A. 7); *United States* v. *Von Jenny*, 39 App. D. C. 377; *United States* v. *Traynor*, 173 Fed. 114 (E. D. Tenn.); *Griffin* v. *United States*, 270 Fed. 263 (N. D. Ga.); *United States* v. *O'Leary*, 275 Fed. 202 (S. D. N. Y.), overruled on another point in *United States* v. *Kelleher*, 57 F. (2d) 684 (C. C. A. 2). This is the first case, so far as we know, where the argument has been made that Section 1020 applies *only* to applications filed after the term.

case that "Judges of *oyer* and *terminer* are the proper judges whether recognizances ought to be estreated or spared" seems directly contrary to the provisions of the statute 22 and 23 Chas. II, c. 22 (1670), made perpetual by 4 William and Mary, c. 24 (1692), which provides in Section V that all recognizances forfeited before any judge of assize must be estreated into the Court of Exchequer. The holding, too, seems contrary to the later decision of *Regina* v. *Lord Drummond*, 11 Mod. 200. In that case the defendant was unable to appear by reason of sickness; his attorney accordingly asked that his recognizance be discharged. The Attorney General consented to the motion. But the court held that it was absolutely without power to discharge a recognizance after default and that the only relief which could be granted was to "respite" the recognizance until the next term. It is true, as the opinion in *United States* v. *Feely* points out, that the "respite" granted in the *Drummond* case was an exercise of authority over the recognizance, but this relief was clearly far less than the remission of a forfeiture. And that the court believed it had no power to extend any greater relief is indicated by its express refusal to discharge the recognizance despite the consent of the Attorney General.

The statement from Blackstone's *Commentaries* (Vol. IV, p. 354), quoted by Chief Justice Marshall in the *Feely* case, does not, we believe, support the view that the courts have a common law power to

remit a forfeiture. That statement does not refer to remission of the penalty of a forfeited recognizance; it refers rather to the methods by which a recognizance which has not been forfeited can be discharged. One method, says Blackstone, is by death of the sovereign, a second is by death of the principal, and a third is "by order of the court to which such recognizance is certified by the justices, (as the quarter sessions, assizes, or king's bench,) if they see sufficient cause * * *."[3] This third method was provided for by the statute 33 Hen. VIII, c. 39 (1541), which, after reciting that a recognizance, even though its condition may be fulfilled, "cannot be made void without the King's especial warrant," authorized the "head officers" of various courts in their discretion to discharge a recognizance. That Blackstone must have been referring to this statutory power to discharge a recognizance on which there was no default, rather than to a common law power of the courts to remit the penalty of a forfeited recognizance, is shown by the fact that, under the statute 22 and 23 Chas. II, c. 22 (1670), made perpetual by 4 William and Mary, c. 24 (1692), almost all forfeited recog-

[3] The reference to certification does not indicate that Blackstone was referring to a recognizance which had been forfeited and estreated. As Blackstone points out on the page preceding the page from which Chief Justice Marshall quoted (Vol. IV, p. 253), the statute 3 Hen. VII, c. 1 (1487), required that every recognizance taken by a justice of the peace must be certified to the next sessions.

nizances were required to be estreated to the Court of the Exchequer, and consequently the courts of quarter sessions, assizes, and King's bench were without power to discharge them.[12]

The various English statutory provisions for the remission of the forfeiture of a recognizance, which Chief Justice Marshall did not analyze in the *Feely* opinion, throw considerable doubt upon the validity of the conclusion which he reached. Reference has already been made to the statute 33 Hen. VIII, c. 39 (1541), which expressly stated that recognizances "cannot be made void without the King's especial warrant," and which accordingly empowered the courts to grant a discharge of a recognizance which had not been forfeited. It seems evident that if the court in which a recognizance was taken had no power to discharge it even when the condition of the bond was performed, the court had no power to discharge it, or to remit the forfeiture, after default. Perhaps even more persuasive is the statute 4 Geo. III, c. 10 (1764), which empowered the barons of the Court of Exchequer to remit the forfeiture of an estreated recognizance. That statute recited as the reason why it was necessary to confer this power upon the Court of Exchequer that many persons had defaulted in the condition of a recognizance because of mere inattention or ignorance, that such persons should be relieved from their

[12] This statute was not repealed until the enactment in 1822 of 3 Geo. IV, c. 46 (see p. 32, *infra*).

forfeiture, but that there were "no easy means at present, for poor persons especially, to procure any discharge." This statutory recital would seem inconsistent with the view that the courts had a common law power to relieve from a forfeiture in their discretion.

The statute 3 Geo. IV, c. 46, enacted in 1822, after the decision in the *Feely* case, is also significant. This statute repealed the requirement that forfeited recognizances be estreated to the Court of Exchequer and expressly conferred the power upon the Courts of General and Quarter Sessions, in their discretion, to order a discharge of the whole or any part of a forfeited recognizance. Were it clear that the courts had a common law power to grant the remission of a forfeiture, as Chief Justice Marshall held in 1813, it would scarcely have been necessary expressly to confer that power upon them in 1822.

But perhaps the most persuasive evidence of all that the English courts had no common law power to remit a forfeiture is furnished by the annotation to *In re Pellow*, 13 Price 299 (1824)—a case, it will be noted, decided after the *Feely* decision. It is there pointed out (p. 303) that "the great source of the general authority of the Exchequer is a Writ of Privy Seal, which is issued at the commencement of every reign, by virtue of which the Court is fully empowered, in their discretion, according to the equitable circumstances of each particular case, generally to compound, mitigate, or

discharge estreated recognizances." It is further pointed out that the Writ of Privy Seal, the terms of which "are not very generally known," recites "*the existence of doubts as to the power of the Court to do this* without the royal authority; and *therefore* the Crown gives them jurisdiction, as a matter of grace, in ease of the subject." In view of this statement appearing in the English reports in 1824 as to the doubtful authority of the Court of Exchequer to discharge a forfeited recognizance in the absence of statute, the earlier decision in the *Feely* case that the English courts did have such power cannot be considered conclusive.[13]

If the question be considered on principle, the existence of a common law power to remit a forfeiture seems even more doubtful. We have pointed out (*supra*, pp. 22–23) that a recognizance is a contract between the principal, the surety and the sovereign, and that, upon default in the condition of a recognizance, an absolute debt is owing to the sovereign. Normally, of course, the courts have no power whatever to release all or any part of a debt owing to the sovereign. And this general rule seems applicable here, since no reason can be advanced why, in the absence of statutory

[13] It seems significant, too, that in Chitty's *Criminal Law* (5th ed., 1847), Vol. 1, p. 92, and Petersdorff's *A Practical Treatise on the Law of Bail* (1835), p. 536, reprinted in *The Law Library*, Vol. X, p. 302, the only reference made to the power to discharge a forfeited recognizance is to the statutory authority conferred by 4 Geo. III, c. 10, *supra*, p. 31.

authorization, the courts should have greater power to relieve a debtor when the debt arises from a forfeited recognizance than when the debt arises from any other contractual obligation. It is true, as pointed out in the *Feely* case, that the court which "possesses all the circumstances of the original offence, and of the default" is the most competent tribunal to determine whether, in a particular case, remission of the penalty of a forfeiture is desirable. That is undoubtedly the reason why the courts were the agency upon which power was conferred by both the English and United States statutes to remit forfeitures on a recognizance. But plainly the fact that the courts are the most competent instrumentality to exercise the power in particular cases does not mean that the power is inherently a judicial rather than a legislative one. To the contrary, since the power is one to release an obligation absolutely owing to the United States, exercise of the power would seem to be beyond the judicial competence in the absence of Congressional authorization.

IV

THE FOURTH QUESTION WAS IMPROPERLY CERTIFIED TO THIS COURT

The fourth question certified to this Court is whether, if the federal courts have common law power to remit the forfeiture of the penalty of a recognizance when the default of the principal is willful, this power is limited to exercise upon an

application made within the term of court at which the order of forfeiture was entered. This question, we believe, was not properly certified, since the application for remission in this case, as shown by the certificate itself, was filed within the term of court at which the order of forfeiture was entered (R. 2). There is accordingly no occasion for the Court to consider whether, assuming that the federal courts have a common law power to remit a forfeiture, that power may be exercised after, as well as within, the term. The principle is firmly established that this Court will answer certified questions only upon points of law which are in actual controversy in the court below. *Triplett* v. *Lowell*, 297 U. S. 638, 649; *Jewell-La Salle Realty Co.* v. *Buck*, 283 U. S. 202, 209; *United States* v. *Mayer*, 235 U. S. 55, 66; *Seim* v. *Hurd*, 232 U. S. 420, 427; *Pelham* v. *Rose*, 9 Wall. 103, 107.

The answer to the question, however, seems clear. The expiration of the term at which the order of forfeiture is entered can affect the power of the court to remit the forfeiture only upon the assumption that the power to remit derives from the inherent power of the court to modify, alter, or vacate its own judgments. This assumption, as we have shown (*supra*, pp. 21–24), is without foundation. If the federal courts have any common law power to remit a forfeiture, it is a power simply to grant relief, as an act of grace, from an indebtedness owing to the United

States. There would seem to be no reason why such a power, if it exists at all, should not be exercised after, as well as within, the term at which the order of forfeiture is entered.[14]

CONCLUSION

The first question should be answered "Yes." The answer to the second question should be that the word "party," as used in Section 1020, describes only the principal in the recognizance. The third question should not be answered, but, if answered, the answer should be "No." The fourth question should be dismissed as raising a point of law not in actual controversy before the court below.

Respectfully submitted.

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Attorney.

OCTOBER 1941.

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[14] In *United States* v. *Cookendorfer*, Fed. Cas. No. 14,856 (C. C. D. C., 1837), however, an opposite conclusion was reached. But cf. *United States* v. *Duncan*, Fed. Cas. No. 15,004 (W. D. Pa., 1863).

APPENDIX

OPINION OF THE DISTRICT COURT

(Filed Oct. 3, 1940)

GOODRICH, *Circuit Judge.*

This is a petition to remit an order of forfeiture entered upon a bail bond. Upon the conviction of Herbert R. Short on an indictment charging a conspiracy to possess an unregistered still and a conspiracy to obstruct the administration of justice, he was released upon a recognizance in the sum of $10,000 conditioned upon his appearance on July 19, 1940 for sentence. The Continental Surety Co. became surety on the bond and in turn was protected by a contract of indemnity executed by Marie M. Short, wife of the defendant. Short failed to appear and an order of forfeiture was entered. However, he was apprehended on August 29 and sentenced on September 12.

Section 1020 of the Revised Statutes (18 U. S. C. A. 601) provides:

> Remission of penalty of recognizance. When any recognizance in a criminal cause, taken for, or in, or returnable to, any court of the United States, is forfeited by a breach of the condition thereof, such court may, in its discretion, remit the whole or a part of the penalty, whenever it appears to the court that there has been a willful de-

> fault of the party, and that a trial can, notwithstanding, be had in the cause, and that public justice does not otherwise require the same penalty to be enforced.

The general interpretation placed upon this section is that the default of the party referred to is the default of the principal, not the surety, and that the conditions enumerated in the statute are jurisdictional prerequisites to the power of the court to remit the penalty. *San Indemnity Co.* v. *United States*, 91 F. (2d) 120 (C. C. A. 3, 1937); *United States* v. *Kelleher*, 57 F. (2d) 684 (C. C. A. 2, 1932); *United States* v. *Nordenholtz*, 95 F. (2d) 756 (C. C. A. 4, 1938); *United States* v. *Costello*, 47 F. (2d) 684 (C. C. A. 6, 1931); *United States* v. *Libichian*, 113 F. (2d) 368 (C. C. A. 7, 1940). The petitioners do not attack this interpretation nor do they deny that the default of Short was wilful. Their contention is that this court has power to remit the forfeiture independently of the statute on the theory that every court has power to modify its orders during the term in which they are rendered, and here the petition for remission was filed during the term in which the order of forfeiture was entered. Judge Acheson so held in *United States* v. *Barger*, 20 Fed. 500 (D. C. Pa. 1884). But more recently the opposite conclusion was reached by the Eighth Circuit in *United States* v. *Rosenfeld*, 109 F. (2d) 908 (1940), the court saying at page 910:

> It will be noted that the Supreme Court holds that upon a default, "the sureties become the absolute Debtors of the United States." It was for the Congress, therefore, to determine under what circum-

> stances the sureties may be relieved of such debt. The courts' authority to disturb this debt is not unlimited, and the authority that courts have generally over their judgments does not apply. A contract has been entered into between the sureties and the Government, and upon its breach the Government becomes possessed of certain rights. Control of the court over the indebtedness must be found in the governing statute. Congress has expressly prescribed the conditions which will vest discretion in the court to remit the whole or a part of the penalty. Wilful default of the principal precludes the exercise of such discretion.

In view of this decision plus the fact that the Circuit Courts which have dealt with the statute have stated in broad language that the conditions therein enumerated are jurisdictional prerequisites to the power to remit, it must be concluded that this court has no power to grant the prayer of the petition.

The petition is, therefore, dismissed.

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